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No. 02-1624

IN THE
SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT, ET AL.,
Petitioner,

v.

MICHAEL A. NEWDOW,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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July 7, 2003

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

The Rutherford Institute hereby respectfully moves the Court for leave to file the following brief *amicus curiae* on behalf of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for *amicus* was unable to contact counsel for Respondent, despite numerous attempts.

The Rutherford Institute is an international, non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases, *e.g., Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), and the Institute has filed as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many First Amendment cases that concern the interplay between the religion clauses of that Amendment. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The Rutherford Institute is submitting a brief *amicus curiae* in

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[1] Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

support of the Petitioner. In light of the important issues being raised in this case, the Institute respectfully requests that its arguments be heard.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[2]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases, *e.g.*, *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), and the Institute has filed as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many First Amendment cases that concern the interplay between the religion clauses of that Amendment.

The Rutherford Institute supports Petitioner's request for review because it regards the case as an extraordinary opportunity for the Court to confirm and uphold the overwhelming weight of its own dicta supporting the constitutionality of public recitation of the Pledge of Allegiance and to articulate a clear and historically valid vision of the Establishment Clause that would permit State education officials to commemorate in public ceremonies and

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[2] *Amicus curiae* The Rutherford Institute files this brief by leave of Court. Counsel for Petitioner consents to the filing, and a copy of the letter of consent is on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

patriotic practices the decidedly theistic origin of the American conception of rights. Petitioner's case also presents the Court with an historic opportunity to consider and apply the precedential weight of the Declaration of Independence as the written spirit animating the Constitution and the philosophical charter of the Bill of Rights and the Establishment Clause thereof.

SUMMARY OF ARGUMENT

The Court's *amicus* believes Petitioner's case offers the Court a rare opportunity to address a longstanding tension between the Court's evolving modern Establishment Clause jurisprudence and certain conflicting dicta in older cases such as *Everson v. Board of Education*, 330 U.S. 1 (1947). Insofar as *Everson* and its progeny have been interpreted to prohibit federal and State governments from recognizing and affirming the theistic origin of the American conception of political rights in civil ceremonies such as the Pledge of Allegiance, such interpretations should be repudiated in favor of a more historical understanding of the meaning and purpose of the Establishment Clause that permits the principle of non-establishment to inform, rather than oppose, government commemoration of America's religious heritage.

ARGUMENT

I. CERTIORARI IS APPROPRIATE BECAUSE THE CIRCUIT COURT'S APPLICATION OF THE SUPREME COURT'S THREE ESTABLISHMENT TESTS CONTRAVENES THE COURT'S OWN CONSISTENT AND EXPLICIT DICTA THAT PUBLIC SCHOOL RECITAL OF THE PHRASE "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE DOES NOT OFFEND THE ESTABLISHMENT CLAUSE.

In *Newdow v. Elk Grove School District*, 292 F.3d 597 (9th Cir. 2002), the Ninth Circuit concluded that Petitioner Elk Grove School District's requirement that public school teachers lead willing students in the Pledge prior to the beginning of each school day constitutes an impermissible establishment of religion due to the Pledge's inclusion of the phrase "under God." In so holding, the Ninth Circuit explicitly rejected dicta in four seminal Establishment Clause cases that stated that recitation of the phrase "under God" in the Pledge of Allegiance is constitutionally permissible. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 602-603 (1989) ("Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (O'Connor, J., concurring) ("Other examples of reference to our religious heritage are found in... the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children – and adults – every year."); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 303-304 (1963) (Brennan, J., concurring) ("The reference to divinity in the revised pledge of allegiance... for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge maybe no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."); and 374 U.S. at 306-308 (Goldberg, J., joined by Harlan, J., concurring) (citing *Engel v. Vitale*, 370 U.S. 421, 435 (1962)) ("There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the

composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State... has sponsored in this instance."); *Engel*, 370 U.S. at 435.

Instead of heeding the implicit counsel of the thirteen Justices who signed on to these opinions affirming the Pledge,[3] the Ninth Circuit determined instead to conjure up and apply atomistically its own ahistorical versions of the Court's three Establishment Clause tests – the *Lemon* test, articulated in *Lemon v. Kurztman*, 403 U.S. 602 (1971), the "endorsement" test, first set forth in *Lynch*, *supra*, 465 U.S. at 690 (O'Connor, J., concurring) and clarified in *Allegheny*, *supra*, 492 U.S. at 592-94, and the "coercion" test, first delineated in *Allegheny*, 492 U.S. at 659-63 (Kennedy, J., dissenting) and rearticulated in *Lee v. Weisman*, 505 U.S. 577 (1992). Applying *Lemon*, the Ninth Circuit determined that the School District's policy has the constitutionally impermissible effect of advancing religion over irreligion, insofar as the phrase "under God," in its view, expresses a preference for theism over atheism. *Newdow*, 292 F.3d at 611. Applying the endorsement test, the Ninth Circuit held that the policy constituted an impermissible "endorsement of religious ideology by the government." *Id.* Finally, applying the coercion test, the Ninth Circuit concluded that the policy impermissibly "place[d] students in the untenable position of choosing between participating in an exercise with religious content or protesting." *Id.* at 608.

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[3] *See Newdow*, 292 F.3d at 614 (Fernandez, J., dissenting) (noting that "Chief Justice Burger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia and Kennedy have so recognized" the constitutionality of the phrase "under God" in the Pledge).

As a matter of pure judicial logic, divorced from the plenary historical support for the Pledge noted by the Court in the cases cited above, the Ninth Circuit's reading of the Court's First Amendment jurisprudence is – at least with regard to the *Lemon* and endorsement tests – arguably defensible. However, in applying these tests at the expense of the tremendous weight of Supreme Court dicta affirming the constitutionality of the Pledge, the Ninth Circuit failed to recognize that the spirit of constitutional jurisprudence is not conveyed through immutable formulae. Rather, as this Court has cautioned, constitutional tests are more akin to heavenly bodies that courts may use to navigate treacherous theoretical waters. *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (calling the three prongs of the Lemon test "no more than helpful signposts"). Navigational stars provide direction, but, when used indiscriminately and without reference to contextual surroundings, they may drive a ship upon a reef. The Court of Appeals has done just that by ignoring a plethora of clear extant High Court guidance on the Pledge. It has fallen to this Court to set the record straight and confirm the unequivocal affirmation of thirteen Supreme Court Justices across four decades that state-led recitation of "under God" in the Pledge of Allegiance is not violative of the Establishment Clause.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE TENSION BETWEEN THE COURT'S THREE ESTABLISHMENT TESTS AND ITS OWN DICTA AND TO REPUDIATE THE DICTA OF *EVERSON V. BOARD OF EDUCATION* THAT HAS BEEN INTERPRETED TO PROSCRIBE GOVERNMENT COMMEMORATION OF THE ROLE OF RELIGION IN PUBLIC LIFE.

One approach by which this Court might embrace the

overwhelming guidance of its own dicta and uphold the constitutionality of the Pledge of Allegiance is articulated by the holding in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court upheld Nebraska's legislative chaplaincy on the grounds that it was a reflection of an "unbroken practice" that for "two centuries" had survived unchallenged and had thus gained the force of positive law. *Id.* at 795. The Court could follow the path of *Marsh* in the instant case by reasoning that public recital of the Pledge before each school day is an intensely patriotic practice that has, over the course of the hundred and eleven years since its inauguration[4] and for the last fifty years since it took on the words "under God," been thoroughly and inextricably woven into "the fabric of our society," such that it presents "no real threat" of an Establishment Clause violation. *Marsh* at 792, 795.

While this approach might succeed in preserving the foundation of the Ninth Circuit's logic – the three Establishment Clause tests in their current form – the Court's *amicus* respectfully submits that the *Marsh* option is less than constitutionally satisfactory and should not be deployed. As a primary matter, the mere fact that an historical practice has been accorded the deference of silence over a long period of time cannot by itself render that practice constitutional. A theory of tacit consent, latent in the Court's opinion in *Marsh*, may offer refuge to the political philosopher attempting to justify the cross-generational existence of an organic State. However, it contains little normative force when policies of that State are subject to judicial review and fundamental rights guaranteed by that State are in question. The First Amendment to the Constitution prohibits Congress from making any law "respecting an establishment of

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[4] *See* Cong. Rec. S8618-83 (daily ed. June 22, 1954) (discussing historical background regarding how the Pledge came to be written and adopted).

religion." If a constitutionally impermissible establishment of religion has been created, it should not be granted a right of adverse possession of constitutional validity simply because a considerable amount of time has passed.

Of course, it is another question entirely whether the fact that a practice has for so long remained undisturbed is indicative of its harmony with an original and proper understanding of the Constitution. In *Marsh*, the Court had the considerable benefit of a pedigree for the institution of legislative chaplains that extended back to the earliest days of the Republic. 463 at 790. Thus, Chief Justice Burger could cite history as authoritative and avoid the deeper question of why the Founders did not view funding of legislative chaplains as offensive to the Constitution when theirs was clearly a religious duty discharged in a civil setting. Here, however, there exists no similar facial link between the Framers of the Constitution and public recital of the Pledge. The Pledge was not written until 1892, a century after the ratification of the United States Constitution, and the phrase "under God" was not added until 1954, only half a century ago.

Despite that seeming disconnect, any number of indirect links could be found to justify applying the rule of *Marsh* to uphold the Pledge of Allegiance in its modified, post-1954 form. In fact, given the sticky tension between the simplistic appeal of the Ninth Circuit's test-based holding and the Court's own unequivocal yet contravening dicta, the Court may be tempted to do so. Yet the Court's *amicus* respectfully contends that the Court should nevertheless resist the lure of this diversionary route and review the Ninth Circuit's decision squarely and comprehensively. A narrow, *Marsh*-based holding would not resolve the core-level tension between the Court's three Establishment Clause tests and forty years of its own dicta. Instead, it would only succeed in deferring

that pressing issue to another day.

A second approach available to the Court to vindicate its dicta and repudiate the Ninth Circuit's rigid, antiseptic holding is offered by Judge O'Scannlain in his dissenting opinion to the Ninth Circuit's denial of rehearing *en banc*. Judge O'Scannlain argues that recital of the amended Pledge of Allegiance is a fundamentally patriotic and political exercise, not a constitutionally impermissible religious exercise. *Newdow v. Elk Grove Sch. Dist.*, 321 F.3d 777, 782-785 (9th Cir. 2003) (denial of rehearing *en banc*) (O'Scannlain, J., dissenting). In a lengthy analysis, Judge O'Scannlain argued that the Court has clearly distinguished between the unconstitutionality of conducting religious exercises such as corporate prayer and the constitutionality of recognizing "the Deity" in "patriotic and ceremonial occasions." 321 F.3d at 779, quoting *Engel*, 370 U.S. at 435.[5] With this distinction marked out, Judge O'Scannlain proceeded to contend that the Pledge should be placed in the latter category – that of "patriotic and ceremonial exercises" – and therefore be subjected only to the voluntariness test imposed on such exercises by *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), a test Elk Grove's policy clearly passes.

The Court's *amicus* admits the constitutional appeal of this approach but submits that mere characterization of the Pledge as a constitutionally permissible, non-compulsory patriotic exercise

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[5] *See also Schempp*, 374 U.S. at 301 (Brennan, J., concurring) ("Any attempt to impose rigid limits upon the mention of God... in the classroom would be fraught with dangers."); *Wallace v. Jaffree*, 472 U.S. 38, 78 (1985) (O'Connor, J. concurring) ("the words 'under God' in the Pledge" should not be deemed unconstitutional); *Lee*, 505 U.S. at 598 ("A relentless and all-pervasive attempt to exclude religion... could itself become inconsistent with the Constitution.").

would not go far enough to resolve the inherent conflict between the Court's Establishment Clause dicta and its holdings. Though the Ninth Circuit panel majority showed little interest in the subtlety and subtext of the Court's Establishment Clause jurisprudence, it did apply its three constitutional tests straightforwardly. To address such a ruling, the Court must not resort to definitional niceties. There can be no doubt, as Judge O'Scannlain argued, that the Pledge contains a predominantly patriotic and political flavor and that California's policy of student participation in the Pledge recital was non-compulsory. But what renders the words "under God" in the Pledge constitutional if they in fact constitute an endorsement of theism over atheism? If this Court's oft-quoted dicta in the landmark case of *Everson v. Board of Education*, 330 U.S. 1 (1947) is the proper constitutional lens,[6] why should state-sponsored recitation of the Pledge not be struck down as an impermissible preference for religion over irreligion? Unless the phrase "under God" has lost all meaning to modern American ears and constitutes nothing more than a lifeless relic from a discarded age, it is undeniably religious in nature. On what principled ground, therefore, can it survive constitutional scrutiny, as long as such scrutiny is defined by *Everson* and its progeny?

Due to the unmistakable strain between the normative language in this Court's holdings and its dicta that the Pledge and other "ceremonial" references to the Deity like the National Motto remain constitutional, the Court's *amicus* contends that neither a narrow, *Marsh*-based approach to the constitutionality of state-sponsored, voluntary Pledge recital in public schools, nor the broader, yet still

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[6] "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can.... pass laws which aid one religion, *aid all religions*, or prefer one religion over another. *Everson*, at 15 (emphasis added).

largely dismissive, approach of placing the Pledge in a special category of non-compulsory patriotic exercises would provide sufficient constitutional guidance to lower courts and executive officials who wish to tailor their holdings and policies to adhere with the Court's interpretation of the Establishment Clause. How then can the Court reconcile the Pledge with its understanding of the Constitution? A single alternative remains: the Court's *amicus* respectfully suggests that certiorari should be granted so that the Court may consider whether to uncompromisingly disavow the *Everson* dicta, insofar as it is interpreted to require that government maintain a posture of symbolic neutrality between theism and atheism and to retool its Establishment tests to accommodate a more historically accurate understanding that permits official recognition of the uniquely American notion of the Divine origin of the rights of humanity.[7]

From the earliest days of colonization to the inception and expansion of the American Republic, our nation's government has never been symbolically neutral with regard to the existence and providence of God. Senator Homer Ferguson understood this when, in 1954, he proposed to amend the Pledge of Allegiance to include the words "under God." In an official statement to the Senate Committee on Appropriations, he disclaimed any First Amendment problem with the new wording of the Pledge by proffering a distinction between establishing a sectarian religion and

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[7] In suggesting that the Court consider repudiating *Everson*'s dicta of "symbolic neutrality" in the context of public commemoration of religious heritage, the Court's *amicus* does not maintain that government may constitutionally discriminate against non-religious entities or individuals with regard to the expenditure of public funds or that it may constitutionally promote one form of sectarian belief over another.

publicly proclaiming the providence of God. In his words, "The phrase 'under God' recognizes only the guidance of God in our national affairs, it does nothing to establish a religion." S. Rep. No. 83-1287, at 2 (daily ed. March 10, 1954), p.2.

It would be one thing if Sen. Ferguson's view of the Establishment Clause were motivated by only a few isolated and peripheral references to the benevolence and mercy of God in America's founding documents. It is quite another when "a volume of unofficial declarations [add to] the mass of organic utterances" that "our institutions presuppose a Supreme Being."[8] In his addendum to the Senate Committee Report, Sen. Ferguson quoted a handful of these "unofficial declarations" and "organic utterances" in order to infuse the amended Pledge with the imprimatur of history and preemptively protect it from Establishment Clause challenge. Among those he cited were the Mayflower Compact and the Gettysburg Address, both of which invoke the Divine as America's preeminent source of guidance and protection at pivotal junctures in our national life.

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[8] *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) and *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Justice Douglas' words have been widely quoted but often misunderstood. Concurring in *Engel*, Justice Douglas explained that the quote intended to convey that "under our Bill of Rights free play is given for making religion an active force in our lives." *Engel*, 370 U.S. at 443. That is all the Court's *amicus* is urging. Echoing this view, Chief Justice Burger employed Justice Douglas' words in *Marsh* to illustrate that "To invoke Divine guidance on a public body entrusted with making the laws is not... an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 795.

The Court's *amicus* recognizes that these and other evidences of the theistic faith of America's founders and historical leaders are not novel to the members of this Court.[9] Consequently, the Court's *amicus* will not belabor the point that the history and traditions of America as evidenced by manifold sentiments of our leaders, observations of foreigners such as Alexis de Tocqueville, inscriptions on national edifices and currency and longstanding practices such as the crier's prayer illustrate the theistic underpinnings of our culture and national life. Instead, *amicus* desires only to encourage the Court to reconsider Sen. Ferguson's vision of a constitutional distinction between establishment of religion and public recognition of the providence of God in the context of the uniquely American conception of divinely bestowed universal human rights, as embodied in the Declaration of

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[9] *See, e.g., Engel*, 370 U.S. at 446-49 (Stewart, J. dissenting) (citing the declarations of myriad presidents, the crier's prayer before each session of this honorable Court, the existence of a legislative chaplaincy in both Houses of Congress, the text of the National Anthem, and the phrase herein disputed in the Pledge of Allegiance as evidence of "the religious traditions of our people"); *Marsh*, 463 U.S. at 786-90 (developing the lineage of legislative chaplaincy in Congress); *Lynch*, 465 U.S. at 674 (noting that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789"); *Wallace*, 472 U.S. at 100-03 (Rehnquist, J. dissenting) (quoting a selection of early American presidents and leaders who invoked the name of God in the course of their public duties); *Lee*, 505 U.S. at 626 (Souter, J. concurring) (admitting that the First Congress hired legislative chaplains and America's first two presidents proclaimed days of public thanksgiving for Divine favor in America's affairs), 505 U.S. at 635 (Scalia, J. dissenting) (relating that the tradition of graduation invocations extends back to the inception of American public schooling).

Independence and incorporated into the Constitution.

Before the Constitution was drafted, the fifty-six members of the First Continental Congress, "with a firm reliance on the protection of Divine Providence," pledged their "lives," their "fortunes" and their "sacred honor" to declare America's independence from Britain. The Declaration of Independence to which they signed their names on July 4, 1776, is America's philosophical charter. In the Declaration's opening lines, Congress articulated the fundamental and immutable connection between God and American government:

> We hold these truths to be self-evident that all men are *created equal*; that they are *endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness...

(Emphasis added.) The vision of rights contained in the American Declaration of Independence departed clearly from the atheistic conception of rights prominently advanced by contemporaneous Continental philosophers such as Voltaire and Jean-Jacques Rousseau and manifested in the French Revolution. In casting the cornerstone of liberty within a transcendent Creator-based framework, Thomas Jefferson incorporated the views of John Locke and Sir William Blackstone, two prominent figures in the history of American legal thought. In his SECOND TREATISE ON GOVERNMENT, Locke wrote:

> For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker... [a]nd being furnished with like Faculties, sharing all in one Community of Nature, there cannot be supposed any such Subordination among us, that may Authorize us to destroy one another, as if we were

made for one anothers [sic] uses.... Every one as he is bound to preserve himself... so by like reason... ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice to an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.

John Locke, TWO TREATISES ON GOVERNMENT §6 (Peter Laslett ed., Cambridge Univ. Press 1960). In his COMMENTARIES, Blackstone wrote:

> The absolute rights of man, considered as a free agent, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty... [is] inherent in us by birth, and one of the gifts of God to man at his creation....

Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765), reprinted in Marshall D. Ewell, ESSENTIALS OF THE LAW: A REVIEW OF BLACKSTONE'S COMMENTARIES FOR THE USE OF STUDENTS AT LAW 21 (Charles C. Soule, Law Publisher) (1882).

To the Framers, the Declaration was foundational in drafting and amending the Constitution. As John Quincy Adams, the fifth President of the United States, explained in his famous oration, "The Jubilee of the Constitution:"

> [T]he virtue which had been infused into the Constitution of the United States... was no other than the concretion of those abstract principles which had been first proclaimed in the Declaration of Independence – namely, the self-evident truths of the natural and unalienable rights of man... always

> subordinate to the rule of right and wrong, and always responsible to the Supreme Ruler of the universe for the rightful exercise of that... power.... This was the platform upon which the Constitution of the United States had been erected.

John Quincy Adams, THE JUBILEE OF THE CONSTITUTION 54 (Samuel Colman, VIII, Astor House 1839).

For Locke and Blackstone, as for the Founders who signed the Declaration and the Framers of the Constitution and its Bill of Rights, the notion of human rights was no ordinary political idea conceived by men for instrumental purposes. Instead, rights were expressions of absolute human equality which resulted from divine creation in the image of a benevolent Creator. The Declaration of Independence and the Constitution of the United States, therefore, are of one piece. The former articulates the philosophical foundation of rights; the latter protects those rights from invasion by government. Without the Declaration, the Constitution is mere flesh without life-giving soul. There can be no equivocating this point. The Establishment Clause of the Constitution cannot be read to deny to the States the right to recognize and symbolically commemorate the central principle embodied in the Declaration, namely that our nation offers "liberty and justice for all" precisely because of our historical and abiding national faith in the Creator. *Everson*'s expansive vision of a symbolically secular state, therefore, cannot coexist with a proper historical understanding of the Founders' distinctly theistic frame of reference.

CONCLUSION

For the foregoing reasons, the Court's *amicus* respectfully submits that a writ of certiorari should issue to the Court of Appeals

to enable the Court to consider whether *Everson*'s dicta of symbolic neutrality should be revisited and to affirm the constitutional authority of the States to recognize and commemorate the distinctly American ideal that civil, political and human rights are of divine origin.

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